

SCAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. BRUCE D. ALPERT

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

ALLAN MEBERG and JOAN MEBERG,

Index No. 17855/04

Plaintiffs,

-against-

MOTION DATE: May 23, 2006

INCORPORATED VILLAGE OF STEWART MANOR,
THOMAS NOVELLI CONTRACTING CORP. and
DVIRKA AND BARTILUCCI CONSULTING, INC.,

Defendants.

Motion Sequence No. 1

INCORPORATED VILLAGE OF STEWART MANOR
and CLARENDON NATIONAL INSURANCE CO.,

Third-Party Plaintiffs,

-against-

THOMAS NOVELLI CONTRACTING and
SCOTTSDALE INSURANCE COMPANY,

Third-Party Defendants.

The following papers read on this motion for summary judgment:

Notice of Motion	X
Opposing Submission	X

Upon the foregoing papers, it is ordered that this motion by third-party defendant, Scottsdale Insurance Company, for an order pursuant to CPLR 3212 granting summary judgment in its favor is denied for the reasons hereinafter articulated.

This is an action to recover property damages sustained by plaintiffs on May 11, 2004, when a sewer backup flooded the basement of their home at 70 Cambridge Avenue in Stewart Manor. The Nassau County Department of Public Works ultimately determined that the sewer backup was caused by work performed by the defendant, Thomas Novelli Contracting Corp. (hereinafter "Novelli"). Novelli was involved in a road improvement project pursuant to a contract with defendant/third-party plaintiff, Incorporated Village of Stewart Manor (hereinafter "Village"), when it appears that one of Novelli's workers ruptured an outer sewer line while installing a drain basin.

Pursuant to the underlying contract, Novelli was responsible for locating and ensuring the safety of all Underground Facilities. The subject contract also required Novelli to procure insurance for the Village for the work it was to performed, to protect the municipality from claims for injury to or destruction of tangible property wherever located arising from Novelli's activities and to add the Village as an additional insured. Lastly, Novelli further agreed to defend, indemnify and hold the Village, among others, harmless from and against, *inter alia*, all claims "arising out of [Novelli's] damage to

Underground Facilities.” (Ex. B, moving papers, contract, GC-12, ¶ 4.4.4)

In December, 2004, the Meberg plaintiffs commenced this action against the Village, Novelli and Dvirka and Bartilucci Consulting, Inc. (hereinafter “Dvirka and Bartilucci ”), which played a design role in the road improvement project. When Novelli’s carrier, third-party defendant Scottsdale Insurance Company (hereinafter “Scottsdale”), refused to defend the Village in the Meberg action, the Village and its carrier, Clarendon National Insurance Company, commenced a declaratory judgment action against Novelli and Scottsdale in the form of this third-party action. The third-party complaint also asserts a cause of action sounding in breach of contract against Novelli.

While Scottsdale has established that the Village is not a named or additional insured in Novelli’s *Commercial Insurance* policy, Novelli provided the Village with a Certificate of Liability Insurance indicating that the municipality was, in fact, an additional insured under its *General Liability* policy issued by Scottsdale.

In any event, the Village may qualify as indemnitee under the *Commercial Insurance* policy issued to Novelli Contracting by Scottsdale Insurance.

Novelli’s insurance agreement (Ex. C, moving papers, CG 00 01 07 98, p 6, ¶ 2) with Scottsdale which was in effect at the pertinent time provided:

If we defend the insured against a “suit” and an indemnitee of the insured is also named as a party to the “suit,” we will defend that indemnitee if all of the following conditions are met:

- a. The “suit” against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an “insured contract;”
- b. This insurance applies to such liability assumed by the insured;
- c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same “insured contract;”
- d. The allegations of the “suit” and the information we know about the “occurrence” are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such “suit” and agree that we can assign the same counsel to defend the insured and the indemnitee¹

The policy (Ex. C, moving papers, CG 00 01 07 98, p 11, ¶ 9 [f]) defines an “insured contract” as

That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume tort liability of another party to pay for “bodily injury” or “property damage” to a third person or

¹Whether this condition has been met by the Village and Novelli Contracting has not been addressed.

organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

The policy (Ex. C, moving papers, CG 00 01 07 98, p 13, ¶ 18) defines “suit” as “a civil proceeding in which damages because of ‘bodily injury,’ ‘property damage’ or ‘personal and advertising injury’ to which this insurance applies are alleged.”

The Mebergs brought suit against the Village and Novelli. The Mebergs claim to have sustained property damage caused purportedly by a sewer backup, which, they allege, was caused by Novelli’s negligence.

The Village appears to qualify as an “indemnitee” under Novelli’s policy with Scottsdale. The Meberg action, directed against both Novelli and the Village, clearly falls within the ambit of the term “suit” as defined by the policy.

Notably, there is no conflict of interest. That the Village played no role in the sewer backup is uncontroverted. Indeed, despite Novelli’ contractual obligation to locate Underground Facilities, Christopher Novelli admitted at his examination-before-trial that no markings were made to indicate where the sewer line was located prior to replacing the catch basin, even though he had reason to believe that a sewer line was located in that area.

Significantly, Dvirka and Bartillucci’s Senior Construction Inspector, Philip Minicozzi, who attended the construction site on a daily basis testified at his examination-

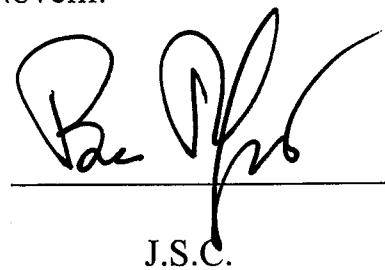
before-trial that markings for the sewer line were never made despite the fact that they were advised.

Moreover, Christopher Novelli further admitted at his examination-before-trial that he replaced the catch basin using a machine and that he did not dig out the area near the Underground Facility by hand even though Novelli was contractually bound to do so.

Lastly, the day after Novelli installed the new catch basin, the Nassau County Department of Public Works responded to the sewer backup and concluded that Novelli caused the center sewer line to break when it installed the new catch basin. Indeed, Christopher Novelli also admitted at his examination-before-trial that following the sewer backup, he personally excavated the area near the newly installed catch basin and found that the center sewer line had been ruptured.

At the very least, there is an issue of fact as to whether the Village is entitled to coverage under Scottsdale's *Commercial Lines* policy with Novelli.

Dated: August 3, 2006



J.S.C.

ENTERED

AUG 10 2006

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**